

CARTELS – BETWEEN THEORY, LENIENCY POLICY AND FINES

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Abstract: *Among the anti-competitive practices sanctioned by competition law, cartel is the most harmful to the competitive environment. Cartel participation is sanctioned both by national and community legislation with large fines, which can reach up to 10% of the turnover of the companies involved. In order to facilitate the detection of cartels, which are, by definition, secret agreements, instructions promoting a leniency program were elaborated at European Commission level, encouraging the participants to provide information regarding the existence of a cartel. It is expected that the large fines applied in cartel cases will increase the attractiveness of the leniency program and, implicitly, to the detection of an even greater number of such practices.*

Key words: *cartel, leniency, fine.*

Defined as an agreement whereby a group of producers or distributors of the same product set the prices or share the market, the cartel is considered to be synonymous to an explicit form of secret agreement, the analysis of the economic effects of cartels being based on the theory of cooperative oligopoly. By artificially limiting the competition, the undertakings avoid the constraints which generate innovation regarding the product development or introduction of some more efficient production methods, leading also to a price increase for raw materials and components. In the long run, these anti-competitive practices weaken competitiveness and have a negative effect on employment opportunities¹.

Because they are perceived as the most harmful form of anti-competitive manifestation, cartels benefit from the greatest attention from the authorities. They are unequivocally harmful to the economy, their existence does not bring any benefit neither to the economy nor to the society (the consumer is the one that finally supports the consequences), and for these considerations they are seen as serious crimes and treated in many countries from the perspective of criminal law.

In some states, cartel-type agreements are treated as illegal regardless of whether their existence affected the market or not. This rule apply, for example, in the U.S.A. where all is needed is just a demonstration of prosecutors or victim that there is an understanding that can have anti-competitive effects. In the European Union, cartels are regulated by Article 85 of the Treaty of Rome, which became Article 81 of the Treaty establishing the European Community, and the undertakings found responsible for such practices can be fined substantial amount.

One of the most efficient means to counter cartels is represented by leniency policy. A 2002 OECD report underlines the efficiency and the generalization of a relatively new tool in countering cartels: “In respect to countering hardcore cartels, the main challenge is penetrating beyond their secret wrapper. To encourage a cartel member to confess and involve his plotters with first-rank evidence, from 'inside', concerning their communications and clandestine meetings, a competition agency may promise a reduced fine, a reduced sentence or even total amnesty².”

In most cases, the existence of a cartel can be assumed from analysing undertakings' behavior in a certain market, from analysing price dynamics and trends of the supply and demand evolution, but uncovering direct or indirect evidence, doubled by a rigorous economic analysis on the existence and operation of cartels, is often a difficult work, thus failures often been found.

¹ Upon Norman, George (ed.), *Recent developments in monopoly and competition policy*, Cheltenham: Edward Elgar, 2008

² The OECD Competition Committee Report (2002);

In this context, the European Union introduced a leniency program - Leniency Policy - subsequently revised in 2002 in light of gathered experience, program shaped on the basic ideas of the similar transatlantic program. In contrast to the more precautionary Notice of 1996, the **Commission notice on immunity from fines and reduction of fines in cartel cases** from 2002³ brings the attractive, and at the same time daring, perspective of automatically granting complete immunity from fine to the first cartel participant presenting information about its existence, even where there is an open investigation on the cartel⁴.

The Americans are pioneers in this area, by promoting a leniency program called Corporate Immunity Program or Amnesty Program in 1978, program which has been revised in 1993. The approach used by antitrust authorities in the United States represents a transposition into practice of the Chicago School economic thinking, being one of the successful applications of practical implementation of game theory⁵.

This type of approach has proven to lead directly to the secret core of cartels. Consequently, once the leniency program was adopted by the European Commission, after 1996 European states have also adopted national programs, integrating the guidelines of Leniency Policy Notice, as a tool to counter cartels.

At the Community level, during 2003-2008 **the fines imposed in cartel cases amounted** to not less than **6.81 billion euro (Table 1)**.

Year	Amount (billions euro)
2003	0,4
2004	0,39
2005	0,68
2006	1,85
2007	3,34
2008	0,15
Total	6,81

Table 1. The evolution of fines imposed in cartel cases in the period 2003-2008*

* The value of fines is not corrected with the decisions of the European Court of Justice and refers only to fines for breaching art .81 of the EC Treaty; following the decisions of the European Court of Justice, total fines amounted to 6.76 billion euro, due to the change in values for years 2003 and 2004;

Source: www.europa.eu.int/competition/cartels/statistics.

For the examined cases, the first 10 fines applied to cartels have amounted to not less than 5.37 billion euro (78.9% of the total fines), the market structure being shown in **Chart 1**.

The main sectors at European level which have been confronted with cartels, as a form of restrictive competition are: chemistry, building materials and some equipment and installations for elevation⁶. Regarding the undertakings, the first 10 fines amounted 2.57 billion euro, their situation being published in **Table no 2**.

	Amount of fines - euro
ThyssenKrupp	479669850
F. Hoffmann-La Roche AG	462000000
Siemens AG	39662500
EniSpA	272250000
Lafarge SA	249600000

³ European Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C45/03).

⁴ See also: Wils, Wouter, *Efficiency and justice in European antitrust enforcement*, Oxford: Hart, 2008

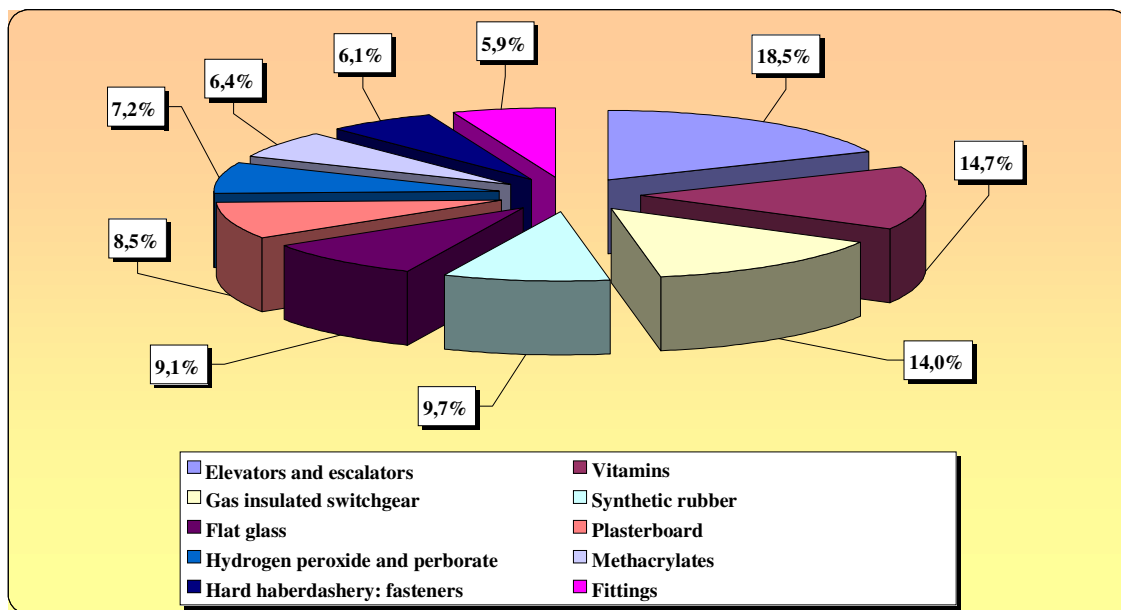
⁵ Kovacic, E. William; Saphiro, Carl, *Antitrust Policy. A Century of Economic and Legal Thinking*, Journal of Economic Perspectives, American Economic Association, vol. 14(1), pages 43-60, Winter 2000

⁶ According to: Jones, Alison; Brenda, Sufrin, *EC competition law: texts, cases, and materials*, Oxford: Oxford University Press, 2008

	Amount of fines - euro
BASF AG	236845000
Otis	224932950
Heineken NV	219275000
Arkema SA	219131250
Solvay SA/NV	167062000
Total	2 570 428 550

Table no 2. The amount of the first 10 fines on undertakings during 2001-2007

Source: Calculations on the basis of statistical data available at www.europa.eu.int/competition/cartels/statistics.



Graph no. 1. The structure of the value of the first 10 fines applied by the European Commission for cartel cases, on the markets investigated during 2001-2007 (%)

Source: Own calculations on the basis of statistical data available at www.europa.eu.int/competition/cartels/statistics.

The largest fines have been applied to some important companies active on the European market, namely: Thyssen Krupp F. Hoffman_La Roche AG, Eni SpA, Lafarge SA, BASF AG, Otis; Heineken NV ss Arkema SA.

The work of the European Commission in the field of cartels materialized in the identification of the 78 cartels since 1990 and so far, of which 73% were discovered in the period 2000-2008 (**Table no.3**).

Period	Number of cartels	% total
1990-1994	11	14,1
1995-1999	10	12,8
2000-2004	33	42,3
2005-2008	24	30,8
Total	78	100

Table no. 3. The number of cartels identified by the European Commission during 1990-2008

Source: www.europa.eu.int/competition/cartels/statistics.

Modeling continuous the policy of leniency in connection with other guidelines combating cartels still remains a topic opened to permanent changes and revisions, induced by the need to prevent the manifestation of any potential anti-competitive practices, on a market with more and more evident globalist trends.

Promoting leniency policy and severely sanctioning cartels must become an essential objective in the activity of any competition authority, in order to induce positive effects in maintaining a normal competitive environment and to guarantee a proper functioning of the market economy.

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